UNITED STATES OF AMERICA.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

W. J. MORRISON, FINLEY MORRISON and SLIGH FURNITURE COMPANY, a Corporation,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

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NINTH DISTRICT

W. J. MORRISON, FINLEY MORRISON and SLIGH FURNITURE COMPANY, a Corporation,

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RESPONDENT'S BRIEF.

STATEMENT OF FACTS.

The facts in this case, as settled by the stipulation and certified copies of the letters and reports from the Commissioner of the General Land Office are briefly these:

The Act of Congress of February 14, 1859, which was accepted by the State of Oregon on June 3 of the same year, granted to that State Sections 16 and 36 of the public lands of every township in the State. Prior

to May 27, 1902, no survey of any kind had been made by the United States of the lands here in controversy. On the 27th day of May, 1902, a field survey was made of three of the boundaries of these lands, under the direction of the Surveyor General of the United States for the State of Oregon. On June 2, 1902, a field survey was made, under the direction of the same official, of the Northwestern and Southern boundaries of said lands, and according to these surveys the lands which are the subject of this suit were described as Section 16 in Township 3 South, Range 6 East, W. M. This survey was approved by the United States Surveyor General for Oregon on June 2, 1903, and six days later the said Surveyor General sent copies of the plat of survey and field notes to the Commissioner of the General Land Office at Washington, D. C., for approval. This survey was not accepted by the Commissioner of the General Land Office until January 31, 1906, the acceptance being delayed because the Deputy Surveyor did not make the proper observation on polaris required by the regulations of the General Land Office, and because of the further fact that the General Land Office was investigating the question of whether or not the applicants for this survey were actual bona fide settlers. This acceptance on January 31, 1906, was specifically designated *for payment only,* and the Surveyor General for the State of Oregon was directed to refuse any entries in the township until the Commissiner of the General Land Office should give further permission. On November 16, 1907, the Commissioner of the General Land Office directed the Surveyor General to place a plat of the

survey in the local land office at Portland, Oregon, and this plat was filed in the local office at Portland on November 16, 1907. On December 16, 1905, the Secretary of the Interior withdrew from all forms of disposition except under the mineral laws of the United States, for forestry purposes, all lands which are involved in this action. On January 25, 1907, the President of the United States issued a proclamation enlarging the Cascade Range Forest Reserve to include the land above described and involved in this action.

On October 10, 1906, the State of Oregon under its laws providing for the disposal of lands owned by the State, delivered a certificate of sale of the Southwest quarter of said Section 16, above described, to Robert F. Louden, and also executed and delivered a similar certificate for the South half of the Northeast quarter and the Northwest quarter of the Northwest quarter of Section 16 to Alvira S. Louden. On January 9, 1907, Robert F. Louden and Alvira S. Louden assigned their certificate of sale to the defendants, Finley and W. J. Morrison, and these said defendants, Finley and W. J. Morrison, surrendered their certificates to the State of Oregon in conformity with the state law on January 9, 1907, and on that date the State of Oregon, by its properly constituted officers, executed and delivered to said Finley and W. J. Morrison a deed of conveyance for the lands described as the subject of this action.

POINTS OF LAW.

I.

THE ACT OF CONGRESS GRANTING SECTIONS 16 AND 36 TO THE STATE OF OREGON DID NOT TAKE EFFECT IN PRAESENTI BUT WAS INTENDED TO CONSTITUTE A GRANT IN FUTURO. THESE LANDS WERE THEREBY RESERVED BY THE UNITED STATES FROM ENTRY AND SALE UNDER THE FEDERAL LAWS, BUT IT WAS THE INTENTION OF CONGRESS THAT TITLE SHOULD NOT VEST, AND THAT IT SHOULD RETAIN THE JUS DISPONENDI, UNTIL SURVEY.

Heydenfeldt v. The Daney Gold and Silver Mining Co., 93 U. S. 634.

Minnesota v. Hitchcock, 185 U. S. 373, 400.

Wisconsin v. Hitchcock, 201 U. S. 202.

U. S. v. Thomas, 151 U. S. 577; 38 L. E. 272.

Cooper v. Roberts, 18 Howard 173.

Hibbard v. Slack, 84 Fed. 574.

Clemmons v. Gilette, 3 Mont. 321; 83 Pac. 879.

Middleton v. Lowe, 30 Cal. 596.

Bullock v. Rouse, 22 Pac. 919.

Cooper v. Roberts, 15 L. D. 338.

Periera v. Jacks, 15 L. D. 273.

Gregg v. Colorado, 15 L. D. 151.

State of Colorado, 12 L. D. 70.

In re Miner, 9 L. D. 408.
In re Virginia Lode, 7 L. D. 459.
In re Colorado, 6 L. D. 412.
State of Washington v. Kuhn, 24 L. D. 12.
Todd v. State of Washington, 24 L. D. 106.
South Dakota v. Riley, 34 L. D. 657.
South Dakota v. Thomas, 35 L. D. 171.
Black Hills National Forest, 37 L. D. 469, 473.
State of Montana, 38 L. D. 247, 250.
Boise National Forest, 38 L. D. 224.
California v. Wright, 24 L. D. 54.
State of Oregon, 41 L. D. 259.
State of Washington v. Geisler, 41 L. D. 621.

II.

WHERE A GENERAL LEGISLATIVE POLICY IS SHOWN TO HAVE BEEN ESTABLISHED, IT WILL NOT BE OVERTURNED UNLESS THE INTENT OF THE LEGISLATURE TO THE CONTRARY APPEAR CLEAR. A HISTORICAL REVIEW OF THE LEGISLATION ON THIS SUBJECT WILL SHOW A DEFINITE LEGISLATIVE POLICY IN STATE SCHOOL LAND GRANTS.

A. *Congressional School Land Grants.*

Ohio Act, April 30, 1802 (2 Stat. 173).
Indiana Act, April 19, 1816 (3 Stat. 290).

Illinois Act, April 18, 1818 (3 Stat. 428).

Alabama Act, March 2, 1819 (3 Stat. 489).

Missouri Act, March 6, 1820 (3 Stat. 545).

Arkansas Act, June 23, 1836 (5 Stat. 58).

Michigan Act, June 23, 1836 (5 Stat. 59).

Iowa Act, March 3, 1845 (5 Stat. 789).

Wisconsin Act, August 6, 1846 (9 Stat. 56).

Minnesota Act, February 26, 1857 (11 Stat. 166).

Oregon Act, February 14, 1859 (11 Stat. 383).

Kansas Act, January 29, 1861 (12 Stat. 126).

Florida Act, March 3, 1845 (5 Stat. 788).

California Act, March 3, 1853 (1 Stat. 246).

Nevada Act, March 21, 1864 (13 Stat. 30).

Nebraska Act, April 19, 1864 (13 Stat. 47).

Colorado Act, March 3, 1875 (18 Stat. 474).

North Dakota)
South Dakota) Act Feb. 22, 1889 (25 Stat. 676).
Montana)
Washington)

Wyoming Act, July 10, 1890 (26 Stat. 222).

Utah Act, July 16, 1894 (28 Stat. 107).

Oklahoma Act, June 16, 1906 (34 Stat. 272).

B. *General Legislation on the Subject.*

Act of February 26, 1859.

Sec. 2275 R. S.

Act of February 28, 1891.

C. *Authorities cited.*

U. S. v. Healey, 160 U. S. 136; 40 L. E. 369.

Morton v. Nebraska, 21 Wall, 660; 22 L. E. 639.

U. S. v. 43 Gallons Whiskey, 108 U. S. 491; 27 L. E. 803.

Ex parte Crow Dog, 109 U. S. 556; 27 L. E. 1030.

Murdock v. Memphis, 20 Wall, 590; 22 L. E. 429.

Ferry v. Street, 4 Utah, 531.

State ex rel Kittel v. Jennings, 47 Fla. 307; 35 So. 986.

Ivanhoe Mining Co. v. Kingston Consolidated Mining Co., 102 U. S. 167; 26 L. E. 126.

Natonia Water Co. v. Bugbey, 96 U. S. 165; 24 L. E. 621.

Sherman v. Buick, 93 U. S. 209; 23 L. E. 849.

Bullock v. Rouse, 81 Cal. 591; 22 Pac. 919.

Gibson v. Robinson, 7 Pac. 428.

Finney v. Berger, 50 Cal. 248.

Medley v. Robertson, 55 Cal. 396.

Gorgan v. Knight, 27 Cal. 522.

Middleton v. Low, 30 Cal. 596.

Hibbard v. Slack, 84 Fed. 575.

Heydenfeldt v. The Daney Gold and Silver Mining Co., 93 U. S. 634; 23 L. E. 995.

Minnesota v. Hitchcock, 185 U. S. 373; 46 L. E. 954.

Layton v. Farrell, 11 Nev. 451.

Clemmons v. Gillette, 33 Mont. 321; 83 Pac. 879.

U. S. v. Birdseye, 37 Pac. 516.

Barnhurst v. Utah, 30 L. D. 314.

Gregg et al. v. Colorado, 6 L. D. 412.

South Dakota v. Riley, 34 L. D. 657.

South Dakota v. Thomas, 35 L. D. 171.

Black Hills National Forest, 37 L. D. 469.

State of Montana, 38 L. D. 247.

III.

NO TITLE TO SAID SECTIONS 16 AND 36 COULD PASS TO THE STATE OF OREGON UNTIL AFTER SURVEY BY THE UNITED STATES, AND TO CONSTITUTE A SURVEY SUCH AS WOULD OPERATE TO VEST THE GRANT THERE MUST BE

(a) A MARKING OF THE LANDS ON THE GROUND,

(b) APPROVAL OF THE SURVEYOR GENERAL, OR, SINCE APRIL 17, 1879,

(c) THE APPROVAL OF THE COMMISSIONER OF THE GENERAL LAND OFFICE AND THE SECRETARY OF THE INTERIOR.

U. S. v. Mont. Lumbering and Mfg. Co., 196 U. S. 573.

32 Stats. 1006.

Cosmos Co. v. Gray Eagle Co., 190 U. S. 301.

Knight v. U. S. Land Assn., 142 U. S. 161.

Magwire v. Taylor, 2 Black, 17 L. E. 137.
6 Copp's Land Owner, 136.
S. P. R. R. Co. v. Burlingame, 5 L. D. 415, 417.
Cal. v. Wright, 24 L. D. 54, 57.
Anderson v. Minn., 37 L. D. 390, 392.
South Dakota v. Riley, 34 L. D. 657, 659.

IV.

PRIOR TO SURVEY TITLE TO SECTIONS 16 AND 36 REMAINS IN THE UNITED STATES, TOGETHER WITH THE RIGHT TO DISPOSE OF SUCH UNSURVEYED LANDS AS MIGHT OR MAY BECOME SECTIONS 16 OR 36 UPON SURVEY.

Heydenfeldt v. The Daney Gold and Silver Mining Co., 93 U. S. 634; 23 L. E. 995.
Minn. v. Hitchcock, 185 U. S. 373; 46 L. E. 954.
Wis. v. Hitchcock, 201 U. S. 202.
Hibbard v. Slack, 84 Fed. 571.
State v. Montana, 38 L. D. 247.

V.

THE EXECUTIVE WITHDRAWAL FROM ENTRY OR ANY FORM OF DISPOSITION, EXCEPT UNDER THE MINING LAWS OF THE UNITED STATES, MADE BY THE SECRETARY OF THE INTERIOR ON DECEMBER 16, 1905, IS A LEGAL WITHDRAWAL OF THE LANDS HERE INVOLVED AND OPE-

RATED TO PLACE THEM WITHOUT THE OPERATION OF THE GRANT UPON SUBSEQUENT APPROVAL OF THE SURVEY.

U. S. v. Blendauer, 122 Fed. 703, 707.

Wilcox v. Jackson, 13 Peters 498; 10 L. E. 264.

Wolsey v. Chapman, 101 U. S. 755; 25 L. E. 915.

U. S. v. Mason, County Court, 145 U. S. 202, 217; 36 L. E. 544.

U. S. v. Grimauld, 220 U. S. 506.

Light v. U. S., 220 U. S. 523.

ARGUMENT.

THE ACT OF CONGRESS GRANTING SECTIONS 16 AND 36 TO THE STATE OF OREGON DID NOT TAKE EFFECT IN PRAESENTI BUT WAS INTENDED TO CONSTITUTE A GRANT IN FUTURO. THESE LANDS WERE THEREBY RESERVED BY THE UNITED STATES FROM ENTRY AND SALE UNDER THE FEDERAL LAWS, BUT IT WAS THE INTENTION OF CONGRESS THAT TITLE SHOULD NOT VEST, AND THAT IT SHOULD RETAIN THE JUS DISPONENDI, UNTIL SURVEY.

Stated simply, the entire question presented in this case is whether the State of Oregon, on or before October 10, 1906, had title to Section 16 in Township 3 South, Range 6 West of the Willamette Meridian, or

any part thereof, so that it could convey those lands to which the defendants now claim title. In determining this question, we must examine the language of the statute granting the so-called school sections to the State of Oregon. This is found in the Act of Congress of February 14, 1859 (11 Stat. 383), which was accepted by the State of Oregon June 3, 1859, and reads as follows:

> "That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of the schools."

The first question to be discussed is, Was this intended as a grant to take effect immediately, or one to take effect *in futuro?* If it took effect upon acceptance by the State of Oregon in 1859 then there is no question that the defendant's contention is correct. If, however, this was not intended as a grant *in praesenti,* but one *in futuro,* as the plaintiff insists, then the defendants have no claims or interest whatsoever in the land described, since the original grantor, the State of Oregon, had no title; for a deed is void if the grantor State had no title to the premises embraced in it (Knight v. United Land Association, 142 U. S. 161).

The plaintiff and respondent contends that this was a grant *in futuro,* which could not possibly take effect until a complete survey had been made by the United States in accordance with its regulations, and the sec-

tions identified; that no title passed to any lands until their boundaries were determined by properly designated authorities.

> Note the language of the Act granting these lands:
> "* * * where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, *shall be granted* to said State for the use of schools."

A consideration of this language makes it evident that Congress considered that sections sixteen and thirty-six might be otherwise disposed of or reserved, and therefore it provided for lands in lieu thereof, none of which could possibly be ascertained without a survey. Indeed it could not be known until after a survey was completed where these sections would fall, and so Congress substituted a like quantity of lands for those identical sections, if it should prove impossible to grant them. How could the location be determined, or the grant take effect, except upon survey, and if Congress had intended to grant those sections *in praesenti,* why should it take the precaution to provide for substituting other sections? In construing a somewhat similar statute granting school lands to Nevada, which is hereinafter quoted, the Supreme Court, in Heydenfeldt v. The Daney Gold and Silver Mining Company, 93 U. S. 634, said:

> "There was no occasion of making provision for substituted lands, if the grant took effect absolutely on the admission of the State into the Union, and the title to the lands then vested in the State. Congress cannot be supposed to have intended a vain thing, and

yet it is quite certain that the language of the qualification was intended to protect the State against a loss that might happen through the action of Congress in selling or disposing of the public domain. It could not, as we have seen, apply to the past sales or dispositions, and to have any effect at all, must be held to apply to the future."

In granting these lands to the State of Oregon, Congress did not say those sections are "hereby granted," as it did in the Nevada Act, but it employed the words "shall be granted," indicating a condition to be performed before the State could secure title.

The Act which granted the school lands to the State of Nevada is as follows (13 St. at Large, 32):

"That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any Act of Congress, other lands equivalent thereto in legal subdivisions of not less than a quarter section, and as contiguous as may be, *shall be* and the same *are hereby granted* to the said State for the support of common schools."

Note that the words "shall be and are hereby granted" are used in the Nevada Act, which would far stronger imply a grant *in praesenti* than the language of the Oregon Act, yet the Supreme Court in Heydenfeldt v. The Daney Gold and Silver Mining Company, *supra,* said:

(page 638) "It is true that there are words of present grant in this law; but, in construing it, we

are not to look at any single phrase of it, but to its whole scope, in order to arrive at the intention of the makers of it. 'It is better always,' says Judge Sharsword, 'to adhere to a plain, common-sense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction.' Gyger's Estate, 65 Penn. St. 312. If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment. With these rules as our guide, it is not difficult, we think, to give a true construction to the law under consideration.

Congress, at the time, was desirous that the people of the Territory of Nevada should form a State government, and come into the Union. The terms of admission were proposed, and, as was customary in previous enabling acts, the particular sections of the public lands to be donated to the new State for the use of common schools were specified. These sections had not been surveyed, nor had Congress then made, or authorized to be made, any disposition of the national domain within that Territory.

But this condition of things did not deter Congress from making the necessary provision to place, in this respect, Nevada on an equal footing with States then recently admitted. Her people were not interested in getting the identical sections 16 and 36 in every township. Indeed, it could not be known

until after a survey where they would fall, and a grant of quantity put her in as good a condition as the other States which had received the benefit of this bounty. A grant, operating at once, and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada, until they were segregated from those granted. In the meantime, further improvements would be arrested, and the persons, who prior to the surveys had occupied and improved the country, would lose their possessions and labor, in case it turned out that they had settled upon the specified sections."

The decision of the case of Heydenfeldt v. The Daney Gold and Silver Mining Company has been approved in many subsequent cases. Justice Brewer, in delivering the opinion in Minnesota v. Hitchcock, 185 U. S. 373, 400, said, in referring to that case:

"Although the terms of the school-land section were terms of present grant, and although the entry by the defendant was after the State had been admitted, yet his title was adjudged superior to that obtained from the State, the court holding that the United States had full power to dispose of the land until after a survey and the identification thereby".

The Act of Congress (U. S. R. S. Sec. 1946) establishing territorial government in Utah contains this language:

"When the lands in said territory (Utah) shall be surveyed under the direction of the Government of the United States, preparatory to bringing the same into market, sections sixteen and thirty-six in

each township in said territory shall be, and the same are, hereby reserved for the purposes of being applied to the schools."

The Supreme Court of Utah, after reviewing some of the decisions above referred to, in Ferry v. Street, 4 Utah 521; 11 Pac. 571, 576, which involved the construction of that statute, said:

"The decisions of the Supreme Court of the United States established the following propositions of law:

"First, that the various Acts of Congress mentioned reserving the portions of the public lands of the United States to the territories or states, for the benefit of their people, vest the title of such lands so reserved in the states or territories *when the lands are surveyed,* or when they are bounded. Until such time the obligation is executory, and the title remains in the Federal Government."

In the case at bar, the plaintiff's contention is far stronger than it could be under the Nevada or Utah grants, for in the Oregon Act words of present grant are omitted. The language is much weaker in the Oregon Act than in the Nevada Act, yet it is no longer questioned that even the Nevada Act did not grant the lands until after a survey, and here the plaintiff is favored again. If a present grant were meant, then why were not words capable of such clear interpretation used? The court may look at surrounding circumstances and conditions obtaining at the time, in determining the construction to be given a statute (Platt v. Union Pacific Railroad Company, 99 U. S. 48). Statutes conveying

lands to states had been in litigation for a decade previous to the passage of the Oregon Act, arising over the question of whether a present or future grant was intended. This fact was well known, and Congress in the face of that, studiously avoided the use of words making the grant *in praesenti.* In fact, it failed to use the words "hereby granted," but employed words of future grant, "shall be granted." This omission to use words clearly meaning a present grant is significant. The only conclusion to be drawn is that a different intendment was meant, and a present grant was not given to Oregon. In construing the Act granting the school sections to Minnesota (11 Stat. at Large, 166), the language of the granting portion of which is identical with the Oregon Act, the Supreme Court said, in Minnesota v. Hitchcock, *supra*:

> (p. 392) "Again the language of the section does not imply a grant *in praesenti.* It is 'shall be granted,'" and (page 401) "In other words, the Act of Admission, with its clause in respect to school lands, was not a promise by Congress that under all circumstances either then or in the future, the specific school sections were or should become the property of the State. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision was made for a selection of other lands in lieu thereof."

When the Act of 1859 was passed, the land in Oregon was unsurveyed and the same situation existed here as existed in Nevada. The phrase "and where either of the said sections, or any part thereof, has been sold or otherwise disposed of" did not refer to a disposal prior to

the passage of the Act; for, as the Supreme Court says in the Heydenfeldt case, *supra*:

> "These sections had not been surveyed, nor had Congress then made, or authorized to be made, any disposition of the public lands."

The Heydenfeldt case is also quoted with approval in the case of The New York Indians v. The United States, 170 U. S. 1, page 18, and in that case the court held that, under the doctrine of the Heydenfeldt case, where there was uncertainty as to the lands granted, the Act was a grant *in futuro*. And in a learned opinion by the Supreme Court of Washington in the case of The State v. Whitney, et ux., 120 Pac. 116, 117, it is said:

> "Prior to the grant of California in 1853 the words used to indicate the grant were 'shall be granted.' These words have uniformly been held to signify the intention of Congress to make a grant *in futuro* to become effective when the lands were subject to identification by survey. * * * The words 'hereby granted' indicate a grant *in praesenti* and pass not a special or limited interest in the land, but are words of absolute donation and vest a present title subject only to survey to give precision to the grant and attach it to any particular tract."

The contention of counsel is that Congress gave to Oregon a grant of sections 16 and 36 by a grant *in praesenti* and that thereby all lands surveyed or unsurveyed became segregated from the public domain and beyond the future disposal of Congress. They rely upon the cases of

Beecher v. Wetherby, 95 U. S. 517;
Cooper v. Roberts, 18 Howard 173; and
Ham v. Missouri, 18 Howard 126.

In the Beecher case a patentee of the Government brought suit against a patentee of the State of Wisconsin for the value of saw-logs cut from section 16. The Supreme Court held that this land, which had been originally occupied by the Menomonee Indians, had been abandoned by them *subsequent to a survey* of the lands, and that therefore, while title to the school sections so occupied by the Indians did not pass under the Wisconsin grant so long as such rightful Indian occupancy continued, at a time after survey and before the trespass sued for, "*no legal impediment existed to the complete investiture* of the title of the State," and that the United States, *after a survey* and the investment of title in the State through abandonment by the Indians, could not then otherwise dispose of section 16. It is interesting to note that counsel for the patentee of the State did not consider the Heydenfeldt case as stating a different doctrine from that for which he contended, but on page 521 he cites the Heydenfeldt case as authority for his contention, and further acknowledged that the Act of Congress of August 6, 1846, which gave to the State of Wisconsin sections 16 and 36, *did not* constitute a present grant, but was in the nature of an executory agreement.

The Beecher case was founded upon the case of Cooper v. Roberts, *supra,* which was a suit in ejectment by the patentee of the State of Michigan against a mineral claimant claiming to hold under a license from the

Federal Government confirmed by the Act of March 1, 1847.

The Act granting Michigan the school lands was passed June 23, 1836. The defendant took possession of the same in 1844. The land was surveyed in 1847 and patented by the State to the plaintiff's predecessors in 1851. Says the court:

> "We agree that until the survey of the township and the designation of the specific section the right of the State rests in compact, binding, it is true, the public faith and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land that shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, *and if there is no legal impediment the title* of the State becomes a legal title. The *jus ad rem* (a right to a thing without possession), by the performance of that executive act, becomes a *jus in re* (a right to a thing implying possession), judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others."

The question then arose whether the Act of March 1, 1847, created a legal impediment to the operation of this principle, either by the reservation of the land for public uses, or by its appropriation to superior things. It will be noticed that the court there recognizes the right in Congress, *eleven years after the passage of the enabling act,* to reserve the lands for public uses or appropriate it to superior claims. The court held that Congress excepted from the operation of the Act of March, 1847,

such mineral lands as might be found on section 16. The court asks this question (page 180):

> "Did the execution of the lease by the Secretary of War, in 1845, *before the survey of the lands,* dispose of these lands so as to defeat the claim of the State?"

and answers the question thus:

> "The lease expired by 'efflux of time,' in September, 1848. There was no renewal of the lease, for the double reason, that its original validity was doubted by the highest executive authority, and those doubts were submitted to by the lessee, and because Congress had passed the law for the disposal of the mineral lands, which determined the covenant for the renewal, by the terms of the lease itself.
>
> Hence, had there been a legal impediment to the execution of the compact with Michigan, erected either by the second section of the Act of 1847, which separated for some purposes the mineral from other public lands, or by the privileges granted to the lessees or their assigns, in the 3d section of that Act, it was removed by the repealing clause of the Act of 1850, and the non-compliance with the conditions upon which the privileges depended. The section No. 16 was, *at that date, disencumbered,* and subject to the operation of the compact, whatever might have been its pre-existing state."

The Court's attention is invited to the fact that nowhere in Cooper v. Roberts is there a hint of any lack of power of Congress to otherwise dispose of the lands prior to survey. But there is an express acknowledgment that Congress could create a legal impediment subsequent

to the enabling act and prior to the survey; and instead of dating the State's title from the date of the enabling Act of 1836, or from the date of the survey in 1847, it dates the State's rights from the removal of the legal impediment by the Act of 1850. We come back then to a determination of *what was the intention of Congress* when it used the words—"shall be granted" and when it passed the Act of February 14, 1859, the enabling act for the State of Oregon.

Congress is itself the best judge of its intentions. It knew whether or not the grant was an absolute one of unsurveyed lands as well as surveyed lands. It knew whether or not it would retain power to dispose of unsurveyed lands prior to survey. If counsel's contention is correct, the State's rights attach to unsurveyed lands the moment the enabling act was passed and Congress could not dispose of unsurveyed public lands, and unless the same were within a reservation at the time the enabling act was passed, it could make no disposition of the lands. Ingenious and able as counsel's contention is, it is absolutely refuted by the action of Congress itself. If the grant to the State was absolute, Congress could not grant to a pre-emptioner or homesteader any preference rights on unsurveyed lands which might thereafter be found to be sections 16 and 36. But on February 26, 1859, (11 Stats. 385), twelve days after the passage of the act for the admission of Oregon into the Union, and on the succeeding page in the statute books, Congress said:

"That where settlements with a view to pre-

emption have been made before the survey of the lands in the field which shall be found to have been made on sections 16 or 36, said sections shall be subject to the pre-emption claim of such settler."

This enactment was included as section 2275 in the Revised Statutes. By the Act of February 28, 1891, Section 2275 was amended and contains the following provision:

"And other lands of equal acreage are also hereby appropriated and granted and may be selected by said state or territory where sections 16 or 36 are mineral land or are included within any Indian, military or other reservation, or otherwise disposed of by the United States; provided, where any state is entitled to said sections 16 and 36, or where said sections are reserved to any territory, notwithstanding the same may be mineral lands or embraced within a military, Indian or other reservation, the selection of such lands in lieu thereof by the state or territory shall be a waiver of this right to said sections and other lands of equal acreage are also hereby appropriated and granted and may be selected by said state or territory to compensate deficiencies for school purposes where sections 16 or 36 are fractional in quantity or where one or both are wanting by reason of the township being fractional or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior without awaiting the extension of the public surveys, to ascertain and determine by protraction or otherwise the number of townships that will be included within such Indian, military or other reservations, and thereupon the state or territory shall be entitled to select the indemnity lands to the extent of two sections for each said townships in

lieu of sections 16 and 36 therein; but such sections may not be made within the boundaries of said reservations."

The reservations referred to in the Act last cited and noted mean those reservations which were formed prior to the survey; because, even by counsel's contention, the enabling act provided for those dispositions of sections 16 and 36. It would be a vain thing for Congress to make two enactments to cover the same subject matter. "Congress cannot be supposed to have intended a vain thing." (Heydenfeldt v. The Daney Gold, etc. Co., *supra.*)

Therefore the Act of February 28, 1891, refers to those reservations which may be made prior to the time of the survey of the land.

In administering the public land laws it has been the uniform opinion of the Department of the Interior that the title to sections 16 and 36 does not vest in the State until the lands are identified by survey and that the date of the survey is fixed, not by the time the work is done in the field, but by the approval of the township plat by proper authorities. If this contention is a correct one, the State of Oregon has used thousands of acres of school indemnity scrip for which the base was unsurveyed public lands within the boundaries of a National Forest, and we take it that no court will adopt a construction of an act which is contrary to the wording of the act itself, to the construction given to it by later enactments, to the approval of the Land Department of the United States and to the decisions of the Supreme Court of the

United States in the Heydenfeldt and Minnesota cases, and which construction has been accepted and acted upon by the State of Oregon itself in hundreds of cases. In leaving this particular phase of the question, we close with the language of the court in the Heydenfeldt case, *supra*:

> "Congress, however, reserved until this (survey of the land) was done the power of disposition, and if in the exercise of this power the whole or any part of a sixteenth or thirty-sixth section has been disposed of, the State was to be compensated by other lands equal in quantity and as near as may be in quality."

And plaintiff therefore insists that the Act which granted sections 16 and 36 to the State of Oregon did not take effect immediately, but that title to the lands involved in this action remained in the United States, and the State of Oregon had no legal title whatever to the lands it attempted to convey.

WHERE A GENERAL LEGISLATIVE POLICY IS SHOWN TO HAVE BEEN ESTABLISHED, IT WILL NOT BE OVERTURNED UNLESS THE INTENT OF THE LEGISLATURE TO THE CONTRARY APPEAR CLEAR. A HISTORICAL REVIEW OF THE LEGISLATION ON THIS SUBJECT WILL SHOW A DEFINITE LEGISLATIVE POLICY IN STATE SCHOOL LAND GRANTS.

It is a proposition of law well settled by the Federal Courts, including the Supreme Court of the United

States, that where it is shown that Congress has adopted a well-settled line of legislative policy in dealing with matters of great public interest, such policy will not be departed from in construing legislative enactments upon the same subject, unless a contrary intent clearly appear. Whenever a statute is open to construction, it would appear that legislative policy, deduced from a long established line of consistent legislation in dealing with similar questions, is a legitimate factor in arriving at the Congressional intent. Numerous decisions of the courts support this view, and it is hardly necessary to cite cases to establish it. The rule has been applied by the United States Supreme Court relative to the policy of Congress in the interpretation of a great variety of statutes; to the policy of encouraging settlement of lands along the line of railroads aided by land grants (*U. S.* v. *Healy,* 160 U. S. 136, 40 L. Ed. 369); reserving from sale salt springs in territories eventually to be organized into states (*Mortion* v. *Nebraska,* 21 Wall. 660; 22 L. Ed. 639); preventing the introduction of intoxicating liquors into the Indian Country (*U. S.* v. *43 Gallons Whiskey,* 108 U. S. 491; 27 L. Ed. 803); and exempting tribal Indians from the operation of general penal enactments affecting white persons (*Ex Parte Crow Dog,* 109 U. S. 556; 27 L. Ed. 1030). And it will be noted that in cases where the courts have held that the terms of the statute varied the prior legislative policy, they have held that such policy is not to be regarded as abandoned further than the terms and objects of the new legislation unmistakably require. (*Murdock* v. *Memphis,* 20 Wall. 590; 22 L. Ed. 429).

An examination of the entire series of state school grants, and of the construction uniformly placed upon them by the courts, will tend to show a definite line of policy on the part of Congress in making these enactments. And a scrutiny of the two sections of the Act of February 14, 1859 (11 Stat. L. 383) relative to the grant of lands for school purposes to the State of Oregon, fails to show that it was intended to except it from the general line of legislative policy. A brief review of the legislation prior to and existing at the time of the passage of this act will be helpful in its consideration.

By Sec. 14, of the Act of March 3, 1863 (12 Stat. L. 814), Congress provided that

> "when the lands in the Territory shall be surveyed, under the direction of the Government of the United States, preparatory to bringing the same into the market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereinafter to be erected out of the same."

This provision was afterward embodied in Sec. 1846 of the Revised Statutes. It is well settled that this provision did not pass any title, or prohibit settlement in such lands prior to survey. (*Ferry* v. *Street*, 4 Utah 531; Barnhurst v. Utah, 30 L. D. 314.) Indeed, by the express words of the Act, it was to become operative only upon survey. However, since it only provides for the Territory, and the question now under consideration is the grant to the State, we need not dwell upon this provision further at this time.

In reviewing the grants to the specific states upon their admission to the Union, we find great uniformity in the language of Congress. The grant to Ohio (Act of April 30, 1802, 2 Stat. L. 175) is in the following language:

> "That sections sixteen and thirty-six in every township and where such section has been sold, granted or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township, for the use of schools."

The grant to Kansas (Sec. 3, Act of January 29, 1861, 12 Stat. L. 126) is as follows:

> "That sections numbered sixteen and thirty-six in every township of public lands in the said State, and where either of said sections or any part thereof has been sold or otherwise been disposed of, other lands, equivalent thereto, and as continguous as may be, shall be granted to said State for the use of schools."

With two exceptions, the language of one or the other of the above clauses was used in all grants up to 1861. See the grants to: INDIANA, Act of April 19, 1816 (3 Stat. L. 290); ILLINOIS, Act of April 18, 1818 (3 Stat. L. 428); ALABAMA, Act of March 3, 1819 (3 Stat. L. 489); MISSOURI, Act of March 6, 1820 (3 Stat. L. 545); ARKANSAS, Act of June 23, 1836 (5 Stat. L. 58); MICHIGAN, Act of June 23, 1836 (5 Stat. L. 59); IOWA, Act of March 3, 1845 (5 Stat. L. 789); WISCONSIN, Act of August 6, 1846

(9 Stat. L. 56); MINNESOTA, Act of February 26, 1857 (11 Stat. L. 166); OREGON, Act of February 14, 1859 (11 Stat. L. 383).

The two exceptions mentioned, in which Congress departed from the theretofore customary language, during the period prior to the year 1861, were in the grants of Florida and to California.

The grant to Florida (Act March 3, 1845, 5 Stat. L. 788), is as follows:

> "That in consideration of the concessions made by the State of Florida in respect to the public lands, there *be granted* to the said State eight entire sections of land for the purpose of fixing their seat of Government; also section numbered sixteen in every township, or other lands equivalent thereto, for the use of the inhabitants of such township, for the support of public schools."

The effect of this grant was considered by the Supreme Court of Florida in *State* ex rel v. *Jennings,* 47 Fla. 307; 35 So. 986, and the Court, after an elaborate review of the authorities, held that the grant was:

> "A special grant *in praesenti* of every sixteenth section in every township *which previous to survey had not been disposed of under legal authority from the Government of the United States.*"

Here is a recognition by the court that, although the language of the grant is *in praesenti,* it *does not operate to vest title* until survey.

The material portions of the grant to the State of

California (Act March 3, 1853; 10 Stat. L. 246) are as follows:

"Sec. 6. *And be it further enacted,* That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and *hereby are granted* to the State for the purpose of public schools in each township, and with the exception of lands appropriated under the authority of this act; or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title and the mineral lands, shall be subject to the preemption laws of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions and limitations therein, except as herein otherwise provided."

"Sec. 7. *And be it further enacted,* That where any settlement, by the erection of a dwelling house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authority of the State in lieu thereof, agreeably to the provisions of the Act of Congress approved on the twentieth day of May, eighteen hundred and twenty-six, entitled 'An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for' and which shall be subject to approval by the Secretary of the Interior. And no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by com-

petent authority; nor shall any person obtain the benefits of this act by a settlement or location on mineral lands."

This Act has been repeatedly before the Supreme Court of the United States (See *Ivanhoe Mining Co.* v. *Kingston Consolidated Mining Co.,* 102 U. S. 167, 26 L. Ed. 126; *National Water Co.* v. *Bugbey,* 96 U. S. 165; 24 L. Ed. 621; *Sherman* v. *Buick,* 93 U. S. 209; 23 L. Ed. 849), and the Supreme Court of California (See *Bullock* v. *Rouse,* 81 Cal. 591; 22 Pac. 919, *Gibson* v. *Robinson,* 7 Pac. 428, *Finney* v. *Berger,* 50 Cal. 248, *Medley* v. *Robertson,* 55 Cal. 396, *Grogan* v. *Knight,* 27 Cal. 522, Middleton v. Low, 30 Cal. 596), and it has been uniformly held not to be a grant *in praesenti,* but that prior to survey the United States had full power of disposition over sections sixteen and thirty-six, and by the exercise of such power these sections might be lost to the State. (See *Hibbard* v. *Slack,* 84 Fed. 575.)

It may be considered that the provision of Sec. 7 of the Act granting lands to the State of California had a controlling effect, in this respect, upon the construction of that act; and it is to this point, that we particularly desire to call attention, since it embodied provisions, which, in somewhat similar form, were shortly thereafter enacted into a permanent statute, and consequently became a part of all school grants thereafter made by Congress. We refer to the Act of February 26, 1859 (11 Stat. L. 385), which is as follows:

"Where settlements, with a view to pre-emption,

have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors; and other lands are also appropriated to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any other natural cause whatever."

It will be observed that the terms of this statute expressly cover both the past and future, so that it is a clear declaration by Congress of both its understanding that it retained the *jus disponendi* of the unsurveyed lands in the States theretofore created, and its intention to continue to retain it in the future. It may be noted in passing that this statute was enacted very shortly after the admission of Oregon into the Union (Act of February 14, 1859, 11 Stat. L. 383), and that Oregon and Kansas, which was admitted in 1861 (Act of January 29, 1861, 12 Stat. L. 126) were the last States whose grants followed what may be termed the old form.

The grants next in chronological order are those to Nevada (Act of March 21, 1864, 13 Stat. L. 30) and to Nebraska (Act of April 19, 1864, 13 Stat. L. 47). Both of these are in identically the same language, as follows:

"Sec. 7. *And be it further enacted,* That Sections

number sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any Act of Congress, other lands equivalent thereto in legal subdivisions of not less than one quarter section and as contiguous as may be, shall be and are hereby granted to said State for the support of common schools."

This grant to Nevada was construed by the Supreme Court of the United States in *Heydenfeldt* v. *Daney,* etc. *Mining Co.,* 93 U. S. 634, 23 L. Ed. 995. It was there held that the grant did not take effect until the status of the land was fixed by survey, and that until that time Congress reserved the power of disposition over the unsurveyed lands. This decision was subsequently quoted with approval in *Minnesota* v. *Hitchcock,* 185 U. S. 373, 46 L. Ed. 954, at p. 967. The grant was also before the Supreme Court of Nevada in Layton v. Farrell, 11 Nev. 451, and that court followed *Heydenfeldt* v. *Daney, supra.* In this case Mr. Justice Beatty, in a separate concurring opinion, based his decision upon the effect of the Act of February 26, 1859 (11 Stat. L. 385), set out above.

The grant to Colorado (Act of March 3, 1875, Stat. L. 475) is in the same language as the grant to Nevada, above, with the exception that where the latter act uses the words "shall be" and "are hereby granted" the grant to Colorado merely uses the words "are hereby granted." It may be noted that this is the first act in which Congress placed a limitation upon the power of the State to dispose of its school lands. A comparison of the grant to this State with the grants to the other States will

show that it is perhaps, of all grants made by Congress, the one most susceptible of being construed as a grant *in praesenti.* However, the Secretary of the Interior, in construing it in 15 L. D. 151, after reviewing the decision of the Supreme Court, held:

> "The principle distinctly announced by the court is, that until the status of the land is actually fixed by survey, as shown by the township plat, so that the grant may attach to the specific section, the government has the absolute power to dispose of it as a part of the public domain, and to provide for its disposal in any manner that may promote the public interest."

And Secretary Lamar, in 6 L. D. 412, held that:

> "Where the fee is in the United States at the date of survey and the land is so encumbered that full and complete title and right of possession cannot then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, and it may wait until the title and right of possession unite in the government, and then satisfy its grant by taking the lands specifically granted." The Act of February 22, 1889 (25 Stat. L. 676)

providing for the admission of the States of North Dakota, South Dakota, Montana and Washington, and making grants of school lands to these states, contained the following provisions:

> "Sec. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed states, and where such sections, or any parts thereof,

have been sold or otherwise disposed of by or under the authority of any Act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided,* That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in the Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of the public domain. 25 Stat. L. 679, 52 L. Ed. 340. 53 L. Ed. 118."

"Sec. 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company, and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed, or unsurveyed, but shall be reserved for school purposes only (25 Stat. L. 679) 52 L. Ed. 340; 53 L. Ed. 118."

These provisions are practically identical with those of the grant to Idaho, except that the proviso in Sec. 10 of the above Act does not appear in the grant to Idaho. The Act was construed by the Secretary of the Interior in *South Dakota* v. *Riley,* 34 L. D. 657, *South Dakota* v. *Thomas,* 35 L. D. 171, *Black Hills* National Forest, 37 L. D. 469, and *State of Montana,* 38 L. D. 247, where it was held that the grant does not take effect as to any specific tracts until survey and that the United States has reserved the *jus disponendi* until that time. To the same effect is the decision of the Supreme Court of Montana in *Clemmons* v. *Gillette,* 33 Mont. 321, 83 Pac. 879.

The grants to Wyoming (Act of July 10, 1890; 26 Stat. L. 222); Utah (Act July 16, 1894; 28 Stat. L. 107); and Oklahoma (Act June 16, 1906; 34 Stat. L. 272) are all subsequent to the grant to Idaho, and are substantially in the same terms as the grant to that state. The grant to Utah was discussed in *Barnhurst* v. *Utah,* 30 L. D. 314, where the Secretary of the Interior allowed a desert land claim upon unsurveyed land, filed subsequently to the Utah grant, but prior to its admission as a State, to go to patent. While this case is not exactly in point, on account of the fact that the State was not in existence at the time of the filing, yet it is valuable as showing that the words "where such sections or any parts thereof have been sold or otherwise disposed of by or under authority of any act of Congress" has a *future* as well as a past application, and thus serves to show the general legislative policy of reserving the

right to dispose of the lands pending survey had not been abandoned.

It will thus be seen that in a consistent line of statutory grants, Congress has clearly indicated a legislative policy to retain the *jus disponendi* in its own hands pending the survey and vesting of title to school lands, and this view is further strengthened by the consideration of certain general legislation upon this subject.

The Act of February 26, 1859 (11 Stat. L. 385) has been previously referred to herein. This provision was reenacted in Section 2275 Revised Statutes, in the following language:

> "Where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands or like quantity are appropriated in lieu of such as may be patented by pre-emptors; and other lands are also appropriated to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever." Act of February 6, 1859, ch. 58, 11 Stat. L. 385.

This was considered in *Ferry* v. *Street,* 4 Utah 531, in which the court said:

> "Sec. 2275, Rev. Stat. U. S. shows clearly that

the understanding of Congress was that title should not vest in the territory or state before the survey. It is where settlements with a view to pre-emption have been made before the survey of the lands in the field, which are found to have been made on sections 16 or 36 those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the land lies, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emption, and other lands are also appropriated to compensate deficiencies for school purposes, where sections 16 or 36 are fractional in quantity, or where one or both are wanting, by reason of the township being fractional, of for any natural causes whatever."

Of course, the point under discussion by the Court was the right acquired by a pre-emption claimant, but the language of the court expressly states that the right to dispose of the lands prior to survey remained in the United States. On this point the court said:

"When a person settled on the public lands with a view to pre-emption, this section gives him a right to patent, notwithstanding the land turns out, when surveyed, to be sections 16 or 36, or a part thereof. *The title and the right to dispose thereof is regarded as in the United States till the survey.* If not, why transfer it by patent to the preemptor? Those sections, or their equivalent in other lands, are regarded as pledged for school purposes. The language of the law is 'reserved or pledged.' The term 'reserved' is regarded as synonymous in meaning with 'pledged.' "

This case was subsequently appealed to the Supreme Court of the United States, but dismissed for lack of jurisdiction: *Street* v. *Ferry,* 119 U. S. 385.

It next becomes necessary to consider the Act of February 28, 1891, which amended Section 2275, R. S. to read as follows:

> "Sec. 2275. Where settlements, with a view to pre-emption or homestead, have been or shall hereafter be made, before the survey of the lands in the field, which are found to have been on sections 16 or 36, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, where sections 16 and 36 are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided.* Where any State is entitled to said sections 16 and 36, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, to compensate deficiencies for school purposes where

sections 16 or 36 are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships in lieu of sections 16 and 36 therein; but such selections may not be made within the boundaries of said reservations; *Provided,* however, that nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservations, and the restoration of the lands therein embraced to the public domain and then taking the sections 16 and 36 in place therein; but nothing in this proviso shall be construed as conferring any right not now existing."

While the Act of 1891 modifies Section 2275 in that the indemnity to be selected may be taken anywhere within the limits of the State, yet the language by which it has been held to operate *in futuro,* as well as retroactively, is not changed; and this law was enacted with the judicial construction which had been placed upon the prior laws before the eyes of Congress. The familiar rule that where words have been judicially interpreted their use in subsequent legislation will be deemed to be with their judicial meaning in view, appears to be applicable here.

It would, therefore, appear that nowhere in the en-

tire course of the school land legislation has it been held that the states acquired any vested interest in the land prior to the survey, that would prevent its disposition by the United States, before the official survey vested the title. As the sections are created, and not identified by the survey, there can be no subject matter to which the grant can attach, and vest an interest (*U. S.* v. *Birdseye,* 37 Fed. 516.)

The entire series of granting acts, taken together with the lieu selection acts above referred to, clearly indicate that Congress, from the first school land grant, has been following a definite, consistent line of legislative policy relative thereto. Unless the language of the grant to the State of Oregon shows clearly and unmistakably that it was the legislative intent to depart from this policy in the grant to that State, no such intent should be read into the law. An examination of the Oregon grant shows no manifestation of a clear and unmistakable intent on the part of Congress to change its general legislative policy on this subject. Indeed, the language there used, would appear to be more susceptible of a construction in line with the previous and subsequent construction of other grants than it would be of a construction differing therefrom. In any event, it can only be urged that the language is doubtful, and subject to various different constructions, and under the rule laid down by the previously cited authorities, this is not sufficient to change a known legislative policy.

NO TITLE TO SAID SECTIONS 16 AND 36 COULD PASS TO THE STATE OF OREGON

UNTIL AFTER SURVEY BY THE UNITED STATES, AND TO CONSTITUTE A SURVEY SUCH AS WOULD OPERATE TO VEST THE GRANT THERE MUST BE

(a) A MARKING OF THE LANDS ON THE GROUND

(b) APPROVAL OF THE SURVEYOR GENERAL, OR, SINCE APRIL 17, 1879,

(c) THE APPROVAL OF THE COMMISSIONER OF THE GENERAL LAND OFFICE AND THE SECRETARY OF THE INTERIOR.

Having concluded that in effect the grant was one *in futuro,* and title to the lands did not immediately pass, let us now consider whether title to the section 16, which is the subject of this action, has since passed to the State of Oregon, and, if so, when.

What is necessary for title to pass? What acts must be done before the State can come into possession of these school sections? There must first be a segregation of these so-called school sections before any title can attach. The Commissioner of the General Land Office has decided, and the courts have held, that the grants of sections 16 and 36 to the states does not vest until a survey has been completed. The Secretary of the Interior in 34 L. D. 657, 659, said:

> "Reservations are not infrequently made of unsurveyed lands. Before survey, what lands pass to

> the State by its grant are impossible of identification. It has always been the rule of construction of school land grants to the States that the right to any particular tract of land is not fixed until the tract is identified by approval of the plats of survey. Congress knew of this established rule of construction, and had it intended that a different rule should apply to the grant here in question it would presumably have so decreed in unequivocal terms. That the grant was not one of the specific tracts, but of quantity to be filled from certain sections, if undisposed of before survey, and was subject to amendment and change by later legislation, was early held by this Department, and that construction has been adhered to."

No survey is complete until it is done according to the regulations of the Department of the Interior. There is no dispute that that Department has the power to lay down such rules and regulations as it deems necessary for the guidance of subordinates. Until, under the rules of the Department, there was a completed survey of these lands, no title could possibly pass. In Knight v. United Lands Association, *supra,* Justice Lamar, delivering the majority opinion of the court, said:

> "It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the Government, and that the action of that department, within the scope of its authority, is unassailable in the courts, except by a direct proceeding."

What constitutes a survey under the rules and decisions of the Department? First, it must be made by

the United States. Second, the survey must be approved by the Commissioner of the General Land Office. Third, the plat of the survey must be filed in the local land office by the Commissioner. If these elements, or any one of them, is lacking, there is no survey within the meaning of the law.

That the United States itself, through properly designated officers, must make the field survey is not questioned. In U. S. v. Montana Lumbering and Manufacturing Co. (196 U. S. 573), the court said:

> "The right of survey is in the United States. * * * A contrary conclusion would impair the Government's right of survey and force it into controversies over surveys made by the railroad or its grantees."

The Commissioner of the General Land Office and the Secretary of the Interior have the right and power to make rules and regulations and modes of procedure in all matters pertaining to the disposition of public lands. Further, the survey must be approved by the Commissioner of the General Land Office. Clearly, if the right of survey is exclusively that of the United States, the Government has also the right to say how such survey shall be made. The rules and regulations of its proper department to that end, unless clearly and entirely unreasonable, are final. The adoption of, and strict adherence to, fixed rules in a matter of so great importance to the whole people as is this, is absolutely necessary. Without it, the orderly and efficient administration of the land affairs of the Government would

shortly become one of uncertainty and chaos. It was formerly the practice to consider the survey complete upon being approved by the Surveyor General, but because of the confusion of that method, on April 17, 1879, the following order was issued (6 Copp's Land Owner, 136):

> "TIME OF FILING TOWNSHIP PLATS IN DISTRICT LAND OFFICES.
>
> The practice of forwarding the triplicate plat to the district land office, before the duplicate plat has been received at the General Land Office, and the approval of same communicated to the Surveyor General ordered discontinued, and hereafter the triplicate plat will be forwarded to the local land office only after notice to the Surveyor General of the approval of the survey. The object of the order is to prevent complications of title, etc., which might arise from entries of lands and subsequent cancellation of survey."

Since this order, there has been no question but that there can be no final survey until it is accepted by the Department, for as the Supreme Court said in City of New Orleans v. Paine (147 U. S. 261, 266), referring to this very point:

> "If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hear-

ing. * * * Obviously, the decision of the Surveyor General approving the act of his deputy, was not a finality, since the papers were forwarded by him to the Commissioner of the Land Office, and by him to the Secretary of the Interior for final approval. So long as there was a superior officer, whose approval was contemplated by law or the regulations of the department, no approval by a subordinate officer would operate as a finality."

But not only must the plat be approved by the Commissioner, but it must be filed in the local land office before the survey is completed, or it cannot be recognized as official. In this case, there was no filing of the plat, and hence no survey until November 16, 1907. In rendering a decision on this exact point, in the case of United States v. Curtner (38 Fed. Rep. 1, at p. 10), Judge Sawyer (with Justice Field concurring) said:

"Unless the actual survey in the field, and making and approving a plat by the Surveyor General without filing it, or a certified copy of it, in the local land office, places the lands in the category of surveyed lands in contemplation of law, then these lands were also selected before they were surveyed by the United States, and the selections were void. The Interior Department did not regard the survey as official until the certified copy of the official plat was filed by direction of the department in the local land office, June 4, 1869. Whether this is to be regarded as the date of the survey or not, we are satisfied that the lands could not be regarded as legally surveyed in such sense as to open them to selection, location, sale, or other disposition till the approved copy of the plat was filed on December 28, 1865. This is the

earliest date at which they could be considered open to selection, if open to selection then. The land office was the place for the disposition and record of the public lands; and until they had an authentic official plat of the surveys of the public land, it would be impracticable to keep a record of them or of their disposition."

Counsel cites the early California cases of Oakley v. Stuart, 52 Cal. 521, 535, and the case of Medley v. Robertson, 55 Cal. 396, in support of the theory that the survey became complete at the time it was approved by the Surveyor General, and the last named case is instructive on these points, both on the question of when a survey becomes a survey and as to when the title to the State of sections 16 and 36 attaches. Says the court, in Medley v. Robertson (page 398), on the last mentioned proposition:

"It has been more than once held by this court that the State cannot convey title to the sixteenth and thirty-sixth sections until after it receives the title, and that it does not receive the title to any specific land until the plat of the survey has been approved by the United States Surveyor General."

The court thereafter proceeds to overrule the dicta in Oakley v. Stuart to the effect that lands have always been treated as surveyed when the lines were run in the field and the monuments or marks established by the proper surveyor, and said:

"It is true that school lands may be said to be surveyed when the lines have been run and the corners established. To hold that such should be deemed

to be a full and completed survey, so as to enable applications for purchase to be made, would practically be to make the acts of the Deputy Surveyor notice to the world, and to compel persons to follow him wherever he went, in order to ascertain what lines had been run and what corners had been established, and would give opportunity for acts of bad faith upon his part in giving private information to his friends, from which they would have an advantage over others. The Surveyor General's office is a public office and his records are public, and to hold that his approval is necessary to complete the survey would place all persons upon an equality and would carry out the principles that where public officers act there should be a record of their acts and a place where the record can be examined by all. *The Surveyor General is the officer charged with the duty of making survey.*"

The attention of the Court is, in this connection, particularly invited to the fact that the California case of Oakley v. Stuart was decided in the January, 1878, term of the Supreme Court of that state.

In the Oakley case, the lands in controversy were surveyed in 1854 and the survey approved by the United States Surveyor General in 1861, the approved plat of such survey having been filed in the local office on April 11, 1873. It is thus apparent that the facts out of which this controversy arose antedated by many years the regulation adopted by the Interior Department on April 17, 1879, and hereinbefore mentioned, which took from the Surveyor General and transferred to the Commissioner of the General Land Office and the Secretary

of the Interior the duty of approving plats of government surveys.

Practically the same state of facts existed in the case of Medley v. Robertson. In this latter case, the survey of the lands in controversy was made prior to or during the year 1873, and the plat and survey approved by the United States Surveyor General for California in 1874, the plat, in the same year, being filed in the United States Land Office. Conflicting applications to purchase were made after the survey, the one before and the other after the approval of the plat by the Surveyor General, but both applications prior to April 1, 1876. It thus appears that all of the acts out of which this controversy arose occurred several years prior to the Interior Department order of April 17, 1879. As has been heretofore stated, before the date of this order, the United States Surveyor General for each state approved the plats of surveys within his state and placed them, after his approval, in the local land office, without awaiting the approval of the Commissioner of the General Land Office, but since this procedure has been altered by the order and regulation of April 17, 1879, this mode of approval has been entirely changed. It is not believed that a single reported case can be found which deals with questions arising since the promulgation of this order and which supports the contention of defendants, to the effect that a survey may be complete without the approval of the Commissioner of the General Land Office and the Secretary of the Interior. In both the Oakley and the Robertson cases the Supreme Court of California referred to the regulations of the United States

Land Office *in effect prior to the order of April 17, 1879.*

Therefore, since the power to impose regulations for the guidance of subordinates rests with the Department of the Interior alone, and since that Department has said through its duly constituted officers that no survey shall be complete until accepted and filed by the Commissioner of the General Land Office, there was no completed survey of these lands until November 16, 1907, and there being no survey of the lands until that time, no title could possibly vest until on or after that date.

PRIOR TO SURVEY TITLE TO SECTIONS 16 AND 36 REMAINS IN THE UNITED STATES, TOGETHER WITH THE RIGHT TO DISPOSE OF SUCH UNSURVEYED LANDS AS MIGHT OR MAY BECOME SECTIONS 16 OR 36 UPON SURVEY.

This proposition appears to be so well settled as to obviate any necessity for lengthy discussion or voluminous citations to cases in which the point is adjudicated. From an early date the courts have taken the position that title under school land grants does not vest in a state until a survey thereof has been completed. The Supreme Court of Utah, in construing the school land grant to that state in the early case of Ferry v. Street, *supra,* says:

> "Until a survey there could be no townships or sections 16 and 36. If the title and legal right to dispose of the land, found by survey to constiute those sections, continued in the Federal Government until survey, then the patent must be held valid in an

action of ejectment. Section 15, above quoted, declares the sections mentioned, 'shall be, and the same are hereby reserved when the lands in said territory shall be surveyed under the direction of the Government.' This language indicates an intention to reserve when the land shall have been surveyed. It does not indicate a grant operating at once and before the survey. * * * No grant *in praesenti* is expressed. The lands are reserved for the purposes mentioned. The right and title remains in the Government. Section 2275 R. S., U. S., shows clearly that the understanding of Congress was that the title should not vest in the territory or state before survey."

The question came before the United States in several cases decided in 1876 and 1877, the first of which was that of Sherman v. Buick, 93 U. S. 209, closely followed by Heydenfeldt v. Daney, etc., 93 U. S. 634; Beecher v. Wetherby, 95 U. S. 517; and Water & Mining Co. v. Bugby, 96 U. S. 165.

In the Heydenfeldt case, Mr. Justice Davis, at page 640, says:

"Until the status of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a 16th or 36th section had been disposed of, the State was to be compensated by other lands equal in quantity, and as near as may be in quality."

In the case of Beecher v. Wetherby, at pages 524-525, the court say:

"We agree," said the court, "that until the sur-

vey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But, when the political authorities have performed this duty, the compact has an object upon which it can attach, and, if there is no legal impediment, the title of the State becomes a legal title. * * * * * In this case, the township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. With this identification of the section the title of the State, upon the authority cited, became complete, unless there had been a sale or other disposition of the property by the United States previous to the compact with the State."

And in the Bugbey case, at page 167, in an opinion by Mr. Chief Justice Waite, it is said:

"In Sherman v. Buick (93 U. S. 209), it was decided that the State of California took no title to sections 16 and 36, under the act of 1853, as against an actual settler before the survey, claiming the benefit of the pre-emption laws, who perfected his claim by a patent from the United States. In such a case, the State must look for its indemnity to the provisions of section 7 of the act. As against all the world, except the pre-emption settler, the title of the United States passed to the State upon the completion of the surveys; and if the settler failed to assert his claim, or make it good, the rights of the State became absolute. The language of the court is (p. 214): 'These things (settlement and improvement under

the law) being found to exist when the survey ascertained their location on a school section, the claim of the State to that particular piece of land was at an end; and it being shown in the proper mode to the proper officer of the United States, the right of the State to the land was gone, and in lieu of it she had acquired the right to select other land, agreeably to the act of 1826."

And to the same effect is the case of Minnesota v. Hitchcock, 185 U. S. 373-393, and the older case of Gaines v. Nicholson, 9 Howard 365, in which latter case, at page 364, the court said:

"The State of Mississippi acquired a right to every sixteenth section, by virtue of these acts, on the extinguishment of the Indian right of occupancy, the title to which, in respect to the particular sections, became vested, if vested at all, as soon as the surveys were made and the sections designated."

The Supreme Court of the State of Montana, in the comparatively recent case of Clemmons v. Gillette (83 Pac. 879) in discussing the school land grant to that State, at page 880, says:

"For it seems to be the rule, applicable to such grants, that, though they operate for some purposes as grants *in praesenti*, conveying the fee, yet until the official survey is made and the plat has been approved by the federal authorities, the grant is not effective to vest title to any specific portion of the land described by the designation of section numbers only." and, "Even a partial survey of the particular section is not sufficient to identify it. United States v. Birdseye (C. C. A.) 137 Fed. 516. The reason of

> the rule is that until the subject of the grant is identified there is no particular portion of the great body of lands in which it is included to which the state may assert title or over which it can exercise exclusive right."

And in a more recent case, decided by Judge Dietrich, of the Idaho District Court, on December 5, 1910, entitled United States v. Bonners Ferry Lumber Co., and reported at page 187 of Vol. 184 Fed. Rep., it is said:

> "Even if it be assumed that the United States has not the legal right to convey the lands to third persons, or, by including them in reservations, permanently to withhold them from the state, it must be held at least that until the lands are surveyed it retains the legal title, and that the title of the state is therefore not complete. At most the state has but an equiable title, and until an official survey is made exact identification of the grant is impossible."

Counsel for appellants Morrison, in his argument before the trial court, laid much stress upon the case of Hibbard v. Slack, reported at page 571 of Vol. 84, Fed. Rep. A well considered opinion by Judge Wellborn of the United States District Court is found in the report of this case. The case, however, is not in support of the contention of appellants, to the effect that the survey is complete when the field work thereof shall have been done. The Hibbard case does not in any sense decide this qustion, but the action is brought to determine the rights of the State to make lieu selections based upon lands included within Forest Reserve when the date of inclusion

thereof is subsequent to the survey of the lands. As the question is put by the court (p. 572):

> "These pleadings raise the following question of law, to wit: Is the State of California entitled to select other lands, in lieu of the sixteenth and thirty-sixth sections of school lands, situated within the exterior boundaries of a public reservation, where said sections were surveyed, and became the property of the state, prior to the date when the reservation was created?"

Nowhere in the opinion of Judge Wellborn is it stated that a survey of government lands is complete when the field work is concluded. The Court, in his opinion, refers to the survey as having been made in the field, but it is not shown that the plats thereof had not been properly and in the usual manner, and in conformity with the Interior Department regulations, formally approved by the proper officials, and a copy of the approved plat filed in the local office before the creation of the reserve in question. The Hibbard case decides nothing, except that advantage may not be taken by the State of California of the lieu selection legislation of Congress to trade for public lands such sections 16 and 36 as may happen to be within the exterior boundaries of a National Forest Reserve, when title to such sections 16 and 36 had vested in the State prior to the creation of such Forest Reserves and the inclusion therein of such state lands. As a matter of fact, it is altogether probable that the survey referred to by Judge Wellborn, as having been made "in the field," was in all respects in conformity to the regulations of the Interior Depart-

ment, and the plat thereof formally approved by the officers of this department, and a copy thereof filed in the local office long before the creation of the land in question.

It is also of interest to note the position taken by the Department of the Interior in this matter.

If the Forest Reserve be considered a permanent reservation, says the Secretary of the Interior to the Commissioner of the General Land Office, in Black Hills National Forest, 37 L. D. 469-472, the Act of 1891 shows that Congress contemplated that the claims of the States to said sections sixteen and thirty-six might be defeated by reason of other disposition being made of the same, because provision is made for indemnity in the event that said sections are included in any National Reservation or otherwise disposed of, thus showing that the Executive Department, under the authority of Congress, might make some other disposition of the land.

> "The grant of sections sixteen and thirty-six, made to the State of Montana by the Act of February 22, 1899, for school purposes, is a grant *in praesenti,* but the right of the State thereunder does not attach to any particular tract of land until identified by survey; and where prior to such identification any section sixteen or thirty-six is embraced in a National Forest, the right of the State to that specific tract dose not attach so long as the reservation continues, but the State is entitled to select indemnity therefor."
>
> State of Montana, 38 L. D. 247.

And of particular interest in this case is a very late

decision of the Secretary of the Interior, made since the institution of this suit and found at page 259 of Vol. 41 L. D. This decision is entitled State of Oregon, and particularly construes the school land grant to that State and here under consideration. As to the time when title passes from the Government to the State, the Honorable Secretary, at page 260, after referring to the lieu selection rights conferred in connection with the grant to Oregon, says:

> "It is clear from this section that title does not pass to the State until survey, nor to reserved lands until the reservation is vacated and the land restored to the public domain. Until such event the right of the State is merely expectant, or inchoate, and though it may stand upon such expectant right and await release of the land from reservation and its restoration to the public domain, it has no title it can convey or right it can assign, and may at any time before vestiture of title relinquish its expectant right by the act of selection of other land as indemnity."

THE EXECUTIVE WITHDRAWAL FROM ENTRY OR ANY FORM OF DISPOSITION, EXCEPT UNDER THE MINING LAWS OF THE UNITED STATES, MADE BY THE SECRETARY OF THE INTERIOR ON DECEMBER 16, 1905, IS A LEGAL WITHDRAWAL OF THE LANDS HERE INVOLVED AND OPERATED TO PLACE THEM WITHOUT THE OPERATION OF THE GRANT UPON SUBSEQUENT APPROVAL OF THE SURVEY.

The lands involved in this action were withdrawn by the Secretary of the Interior for forestry purposes on December 16, 1905, almost two years before a survey was made and before a title could possibly pass to the State of Oregon. It cannot be questioned that the Secretary of the Interior had the authority to withdraw the land designated. His power to do so has not been doubted, since the United States Supreme Court has in the late cases of U. S. v Grimaud, 220 U. S. 506, and Light v. United States, 220 U. S. 523, affirmed that right.

A proclamation setting apart the late Como Forest Reserve was made by the Secretary of the Interior, and it was held in the case of U. S. v. Blendauer, 122 Fed. 703, that it was not necessary that the President sign the proclamation. It will be considered as having been done by the Secretary at the direction of the President, and with his approval.

The court's attention is also called to this significant disclosure made by the stipulation of facts and the certified copies of the letters from the Commissioner of the General Land Office in evidence: That from June 8, 1903, until January 31, 1906, the survey was held up purposely by the Commissioner of the General Land Office because on the face of the survey, it was at once shown that the deputy surveyor did not comply with the regulations of the General Land Office; and furthermore, when the survey was approved, which was not until two months after it has been withdrawn for forestry purposes, it was accepted *for payment only*, and the Surveyor-General was ordered to direct the local land of-

fice to permit no entries to be made until the Commissioner gave the permission, and finally approved the survey and ordered the filing of plats in the local office. So that, even had the lands not been withdrawn previously, the State of Oregon had no title to convey on October 10, 1906, since the survey was accepted *for payment only and not for settlement.* But the plaintiff does not admit that there was a survey until the plat was filed on November 16, 1907, thus doing away with any question that Oregon ever had title; but were it to admit, which it does not, that the survey was completed on approval, it would not then have been possible for title to pass until January 31, 1906, while the land had been withdrawn on December 16, 1905.

The defendant contends that the executive proclamation itself excepted from this effect the school lands. School lands are given to the State of Oregon by *grant,* not by a withdrawal or a reservation, and those words are used in the proclamation to refer to withdrawals for Governmental purposes, such as Indian Reservations, Fish Hatcheries, Military Reservations, and the like. A National Forest, to be properly administered, should be in a compact body, and there is no reason why the President should have excepted from the Cascade Range Forest Reserve the unsurveyed sections sixteen and thirty-six, which would thereby entail a divided authority over the lands within the outer boundaries of the forest. As in the case of Minnesota v. Hitchcock, the court held that the Governmental necessity for the education of the Indians was superior to the granting to the State for school lands, so in this case the court must surely

reach the conclusion that the Governmental necessity declared by the Executive in the exercise of the powers given him by the Statute (26 Stats. L. 1103) is superior to the claim of the State to this specific section. This particular section is necessary to a proper administration of the National Forests. The State is interested in getting 640 acres of land to sell for the benefit of its school funds. It makes no difference whether those lands be in the Cascade National Forest or any place else in the State of Oregon if the State obtains this right; and the court knows that the income to be derived from the sale by the State of school indemnity scrip is greater than is derived from the sale of a particular piece of school land, because the scrip can be located anywhere. Although the State may, under the Act of February 28, 1891, await the extinguishment of the reservation, yet until that reservation is extinguished it has no established equity in those lands. It has nothing to convey to the defendants in this case. If the Government desires, it might pass a law selling these and other lands to private individuals and using the funds for Forest and other National purposes. The title is in the United States. The land was segregated from the public domain before the State's title attached, and unless it is restored to the public domain the State's title never will attach.

A recent and interesting case upon this phase of the controversy is that of Alberger v. Kingsbury, decided in the Supreme Court of California, and reported in 91 Pac. at page 674. This case is one brought to test the validity of a lieu selection, the base of which was an unsurveyed school section sixteen. The township which,

upon survey, would include the base land, had been temporarily withdrawn by order of the Secretary of the Interior, pending an examination to determine the advisability of including the same within a Forest Reservation. Such order of withdrawal was in force at the time the application for the lieu selection was made, and the suit brought, but the unsurveyed base lands had not been, by executive order, thrown into the contemplated Forest Reserve, nor had it been determined that the reserve including these lands should be created. In a well considered opinion by Presiding Judge Cooper, it is held that where lands have been withdrawn by the Interior Department pending further action, with a view to including the same within forest or other reservations, they become a part of a lawful reservation and the title of the State thereto cannot attach. Judge Cooper, at pages 675 and 676, says:

> "The words 'other reservations' are evidently used in a broad sense in the statute. The word 'reservation' is defined in the Standard Dictionary as 'that which is reserved, kept back, withheld.' The said sixteenth section, to which the state would be otherwise entitled, has been by the proper authorities of the United States—the Land Department—kept back, withheld, and reserved. It has been reserved with a view to including it in a permanent forest reserve. The state is not now entitled to it, because the United States has seen fit to reserve it for its own uses. It is no answer to this to say that the reservation may not be made permanent, and that the state may yet be entitled to the land. That might be said as to any other kind of reservation—for mili-

fore, the plaintiff respectfully submits that the deed to defendants should be canceled and the title of the Government to the above described lands quieted.

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(In all excerpts of decisions and statutes, the italics are presumably ours.)